Supreme Court, U.S.
FILED
OCT 26 1994
OFFICE OF THE CLERK

No. 94-443

In The
Supreme Court of the United States
October Term, 1994

MODERN GRAPHIC ARTS, INC.,
a Florida Corporation, and
TIMES PUBLISHING COMPANY,
a Florida Corporation d/b/a
ST. PETERSBURG TIMES

Petitioners,

vs.

WILLIAM C. BEDINGHAUS, ROBERT D. BACON,
BARBARA J. ORR, Individually
and as Class Representatives,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Eleventh Circuit

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION

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PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION

Petitioners submit this Response to the Brief in Opposition filed by Respondents. Because the Brief in Opposition contains several misstatements, Petitioners are compelled to correct the record.

Refutation Of Respondents' "Fact" Allegations

Respondents wrongfully accuse the Petitioners of "several misstatements of the facts and the law". Respondents' Brief, p. 1. Petitioners first refute each and every alleged "misstatement of fact" or "law". Petitioners demonstrate that Respondents have plainly and self-servedly misrepresented the facts of record in an effort to avoid this Court's review.

Respondents first challenge the Petitioners' statement that the benefit package provided by successor MGA ownership was virtually the same as the benefit package provided by MGA. First, there was nothing at all erroneous or misleading about the Petitioners' statement. Contrary to Respondent's suggestion, Petitioners never said that each and every benefit was "identical". Rather, Petitioners correctly pointed to the undisputed record fact that the "overall level of benefits" was virtually the same because:

> the value of the Plaintiffs' total benefit package did not diminish as a result of the asset sale . . .
>
> The record fact is that a benefit package of comparable value, though not identical benefits, was provided.

Pet. p. 5 n.2.

Not only is Petitioners' fact statement regarding a fully comparable benefit package fair and accurate, Respondents' opinion that "the purchasing corporation did not have the same level of benefits" is nothing more than self-serving, partisan argument.

Respondents do not redeem their fact misrepresentation by citing the Circuit Court's observation that years of service were not carried over by successor ownership. In fact, Petitioners strenuously argue that the Circuit Court plainly erred in finding ERISA benefit entitlement based upon the terms of the successor owner's benefits package. The indisputable, uncontroverted record fact is that the Petitioners' severance plans do not in any manner hinge entitlement on whether a successor owner maintains the same level of severance benefits. And, severance pay is unvested and contingent; there is no future right to severance pay. Petitioners urge that the Circuit Court erred by scrutinizing the successor ownership's severance plan as a basis to find entitlement under the

Petitioners' programs. The successor owner's benefits are not a term of Petitioners' plan; entitlement under Respondents' plan cannot be fixed by resorting to this "evidence".

Next, Respondents argue that the Plaintiffs "never conceded" that the term "discharge" did not apply to their employment situation during the ownership change. Respondents' contention is the misrepresentation. The plain record fact, of which Respondents are fully aware, is that each Plaintiff testified that, in their opinion, the term "discharge" does not apply where the job continues.

Specifically, Plaintiff Bedinghaus testified that the term "discharge" means actual loss of the job:

> Q. And didn't you indicate to me earlier that the term "discharge" . . . means to you [that] you're out of a job?
>
> A. Yeah. If you took it in that term and you just said you were discharged, that would mean that you would be without a job . . . .

Bedinghaus Depo. pp. 96-97, 98.

According to Mr. Bedinghaus, the term "discharge" simply did not apply to the situation where employees continue at the same job, at the same location, under the same name, serving the same customers. Id. In

the context of the MGA sale, the statement that "Bill Bedinghaus was discharged from MGA" was incorrect and misleading:

> [I]f you read in the paper [that I was discharged from MGA] . . . you might assume that [I was] no longer working in the capacity that [I] was working before. . . . [That statement] would have been lacking information for someone to hear it that way . . . it would look like that I was not working at all for MGA or a company called MGA.

Bedinghaus Depo. pp. 86, 89.

Plaintiff Bacon also confirmed that the term "discharge" never applied to MGA employees:

> "Discharge" is a term I wouldn't use, I don't use in talking about the change of this company. . . . Discharge I would say was inappropriate.

Bacon Depo. p. 96 (emphasis added).

And, although Plaintiff Orr later attempted to avoid her admission, she agreed the term "discharge" does not apply where a employee remains in the same job, with the same duties, at the same location, for the same wage. Orr Depo. pp. 67, 68.

Thus, although their legal argument is that "discharge" occurs when assets are sold but jobs continue, Respondents fully acknowledged that, in the real world, the term "discharge" means something far different;

it means just what Mr. Bedinghaus described: "you would be without a job". There was no misrepresentation of any fact by Petitioners.

Next, Respondents claim that Petitioners misstated that there was no evidence to support the Circuit Court's extraordinary finding that the use of the word "staffer" rather than the synonymous term "employee", created a plain and unambiguous commitment that the business would be owned by Petitioners or severance would be paid. The Petitioners fully stand by their position; the Petitioners vigorously refute Respondents' suggestion that self-serving opinions set forth in the Respondents' partisan affidavits contain "evidence" of any "fact" to sustain the Circuit Court's findings. The Petitioners stand by their position that Respondents' partisan opinion is not "evidence" under the Federal Rules.

Finally, and "most importantly", Petitioners allegedly "misstate the law" concerning ERISA's definition of severance benefits in terms of "unemployment". Respondents' argument aside, the ERISA fact which was fully noted by Justice Ginsburg writing for the D.C. Circuit in Abbey v. Resolution Trust Corp., 984 F.2d 1201, 1205 (D.C. Cir. 1993), is that the definition of an ERISA "welfare benefit plan" specifically contemplates benefits in the event of unemployment. Justice Ginsburg correctly

recognized the relationship between severance pay and job loss. Retired Justice White also recognized the fact that severance is intended to buffer temporary unemployment. Headrick v. Rockwell Int'l Corp., 24 F.3d 1272, 1276-77 (10th Cir. 1994) (White, Associate Justice (Ret.)). Unemployment is clearly not, as Respondents state, "completely divorced from the concept of severance pay." Respondents' Brief, p. 3. Severance pay with continued employment is a windfall, a "happy period of double income." Headrick, supra, 24 F.3d at 1277. Petitioners' reliance on and agreement with Justice Ginsburg and Retired Justice White is hardly "misstating the law", as Respondents urge.

LEGAL ARGUMENT

Respondents Misstate And Oversimplify The Substantial Circuit Split On This Critical ERISA Entitlement Question.

Petitioners have alerted the Court to the deep and irreconcilable circuit split on the question of severance pay without job loss. In an effort to avoid this Court's review, Respondents mischaracterize the circuit split, and refuse to acknowledge the future effect of the Eleventh Circuit's decision granting severance entitlement without job loss.

Respondents attempt to dismiss the circuit split on the proposition that each case turns on the specific language of the particular plan and

therefore no particular precedent is ever set. Respondents fail to comprehend that all plans utilize slightly different verbiage. Respondents' sophistic approach does not square with reality. In the final analysis, a court's ruling on any ERISA entitlement issue is "limited" to the specific terms of the particular plan specifically before it which frame the issue. This obviously does not preclude a legal question from having implications and effects which transcend the particular "facts" of the underlying case.

The fact, which Respondents' rhetoric cannot change, is that the question of severance benefit entitlement on ownership change has yielded inconsistent results throughout the circuits.

The following Table pointedly demonstrates the circuit split: in the Second, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits, severance pay conditioned on job loss is not due where employment continues without interruption. The cases that award severance without loss of the job contain an unambiguous plan promise of a continued employment relationship with a particular company. Only in the Eleventh Circuit can employees be protected against job loss and receive severance pay, despite no promise of a continued employment relationship. The Eleventh Circuit awards severance pay where there is no "termination" or "dismissal"; in

fact, due solely to the Company's efforts, no jobs were lost and Plaintiffs' employment continued uninterrupted.

Circuit	Case Name[1]	Operative Plan Language	Employment Prerequisite	Severance Pay?
First	*Bellino*[2]	"termination...for lack of work"	job loss	Yes
	Allen	"involuntary termination by reduction in force	job loss	No
Second	*Accardi*	"mutually agreed resignation" or "dismissal"	job loss	No
	Schwartz	"dismissed"	job loss	No
	Bradwell	"permanently laid off"	job loss	No
Third	*Ulmer*	"Company will secure employment elsewhere and make severance payment"	separation from co.	Yes
Fourth	*Holland*	"job termination"	job loss	No
	Sejman	"terminated"..."job elimination"	job loss	No
	Fuller	"laid off...or terminated ...due to closing of plant"	job loss	No

[1] The full name and citation to each of these cases, previously cited in the Petition, are contained in the endnote to this Brief.

[2] Bellino is of dubious precedential value, in light of the First Circuit's later decision in Allen v. Adage, 967 F.2d 695, 701 (1st Cir. 1992).

Circuit	Case Name	Operative Plan Language	Employment Prerequisite	Severance Pay?
Sixth	*Adcock*	"eliminat[ion of] position"	job loss	No
Seventh	*Sly*	"involuntarily terminated"	job loss	No
Eighth	*Lakey*	termination "due to a period of unemployment"	job loss	No
	Harper	"permanently terminated or laid off"	job loss	No
	Schroeder	"laid off due to...lack of work"	job loss	No
Ninth	*Blau*	"alternative employment opportunities unavailable within the corporation"	separation from co.	Yes
	Jung	"involuntary termination"	job loss	No
Tenth	*Headrick*	"laid off for lack of work"	job loss	No
Eleventh	*Anderson*	"Company terminates employer-employee relationship"	separation from co.	Yes
	Harris	"involuntary termination... [and no] new assignment [within the company]"	separation from co.	Yes
	Bedinghaus	"termination"/"discharge as a full-time staffer"	job loss	Yes

The indisputable fact is that whatever the wording of the plan, the concept is precisely the same: courts outside the Eleventh Circuit will not find severance entitlement where no job is lost. Whether couched as "termination", "discharge", "lay off", "position elimination", or "lack of work", the fact is that in the numerous circuits cited above by Petitioners, ERISA severance is not triggered by an ownership change with uninterrupted employment (absent an express promise to that effect in the plan).

The language of Petitioners' plans also condition benefit entitlement in terms of loss of the job; "termination" and "discharge". These terms are the functional equivalent to other job loss language in plans, such as, "layoff", "position elimination", and "lack of work." Whatever the term, the effect on employees is the severance prerequisite; where no job is lost, no severance is due. The Eleventh Circuit has

ignored this ERISA fundamental, in conflict with the other circuits cited above.[3]

The Plaintiffs and the Eleventh Circuit have turned the "primary intention" of severance pay "on its head". Headrick v. Rockwell Int'l Corp., 24 F.3d 1272, 1276 (10th Cir. 1994) (White, Associate Justice (Ret.)). The Eleventh Circuit has created severance entitlement on nothing more than a restructure of the employer-employee relationship, without loss of the job. In the Eleventh Circuit, a severance plan requirement of "termination" and "discharge" has been construed to describe an ownership change while the job continues uninterrupted. Employees in the Eleventh Circuit who are transferred to a new owner receive the "happy period of double income" that was never contemplated by the plain ordinary meaning of plan terms. Headrick v. Rockwell Int'l Corp., supra, 24 F.3d at 1276-77.

Respondents further continue to mischaracterize the concept of "unemployment" in the case law, arguing that entitlement turns on whether

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[3] In Bedinghaus, the Eleventh Circuit even went beyond the special protections found in the Anderson and Harris plans, which condition severance on separation from the company rather than loss of the job. In Bedinghaus, no such special protection existed; job loss was the severance prerequisite.

the severance policy "contemplates unemployment as a condition of severance pay". Respondents' Brief, p. 4. Petitioners are aware of no case, and Respondents have cited none, which conditioned severance benefits on actual unemployment; i.e., the employee is no longer working at any job after termination. Rather, the case law confirms that severance benefits are intended to buffer the employee against job loss -- whether or not the employee has secured another job before experiencing actual unemployment.

In this case, of course, there was no job loss; there was never a threat of unemployment. The record is undisputed that the Times ensured there would be no job loss to the MGA staff in the ownership change. The Plaintiffs continued in the same jobs they held prior to the sale. The ownership change never resulted in any job loss, much less a period of actual unemployment.

Respondents charge that Justice Ginsburg and Retired Justice White have "indulged in speculation" that severance plans are intended to buffer employees from the economic consequences of job loss. Respondents' Brief, p. 9. Petitioners submit that Justice Ginsburg and Retired Justice White have correctly identified the primary purpose of ERISA severance

pay.[4] Headrick v. Rockwell Int'l. Corp., 24 F.3d 1272, 1276-77 (10th Cir. 1994) (White, Associate Justice (Ret.)); Abbey v. Resolution Trust Corp., 984 F.2d 1201, 1205 (D.C. Cir. 1993) (Ginsburg, J.). Severance pay is a voluntary employee benefit provided by employers, generally available to employees who lose their jobs through no fault of their own.[5] Any ERISA severance entitlement case must be viewed through this prism.

Contrary to Respondents' admonition that an examination of the purpose of ERISA severance benefits is "inappropriate speculation", Petitioners submit that ERISA entitlement questions cannot be determined without reference to ERISA and the purpose of severance pay. This Court's review is necessary to confirm the purpose of ERISA severance entitlement.

The Conflict With This Court's Holding In *Bruch* Is Very Real.

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[4] While some severance plans also reward past service, this concept is embodied in the amount of severance provided (e.g., one week severance for each year of service). The amount of severance due is entirely different from the threshold question of entitlement. If severance plans were only intended to reward past service, entitlement would include voluntary resignations and terminations for cause.

[5] Black's Law Dictionary (5th ed.) defines severance pay as: "[p]ayment by an employer to an employee beyond his wages on termination of his employment. Generally, it is paid when the termination is not due to employee's fault..."

Respondents advise this Court that Petitioners have raised the ambiguity argument "for the first time in this action." Respondents' Brief, p. 11. Nothing could be further from the truth. In fact, Petitioners argued to both the district court and the Eleventh Circuit that although they believed the plan to unambiguously condition severance pay on job loss, if the court found both Petitioners and Respondents made reasonable interpretations of plan language, then the plan language was ambiguous and evidence of drafter intent and past practice must be considered. Here, Petitioners' evidence of drafter intent and past practice was overwhelming and uncontradicted. There was no severance entitlement when no job was lost.

The district court found the plan terms unambiguously described job loss and held that no benefits were due. The Eleventh Circuit viewed the same language and concluded that plan terms unambiguously rendered job loss irrelevant and held that severance payment was due. The parties stipulated to the Eleventh Circuit that each side believed the plan to be unambiguous in their favor. The facts pointedly demonstrate that the plan terms could be deemed ambiguous, i.e., capable of more than one

reasonable meaning.[6] The possibility of an ambiguity is further buttressed by the fact that the circuit courts are split on the question of whether an ownership change, whether by sale, corporate restructure, spin-off or the like, triggers severance entitlement.

Petitioners suggest that the Eleventh Circuit erred by finding that the plan unambiguously required severance to be paid, and by not finding at the very least that an ambiguity existed. Petitioners argue that the Eleventh Circuit general approach in construing severance plan terms to trigger benefits without regard to job loss, is in conflict with the letter and spirit of this Court's Bruch analysis.

This Court is not the forum for the parties to advocate the relative strength of the extrinsic evidence that supported Petitioners' position on this benefits entitlement issue. Petitioners decline to be drawn into Respondents' debate. On this Petition, the relevant inquiry is whether the Eleventh Circuit disregarded Bruch by refusing even to consider the possibility and effect of ambiguity; and the evidentiary analysis concerning

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[6] Respondents argue that, if Petitioners' argument is accepted, the fact that advocates urge contrary positions will ipso facto create an ambiguity. This is not true; an ambiguity requires two or more reasonable interpretations.

intent and past practice which, under Bruch, must be scrutinized in resolving ambiguous plan terms. The Eleventh Circuit's result-oriented conclusion that the plan required payment of severance benefits without job loss, falls far short of the Bruch analytical framework. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

This Court's review is required to resolve the Circuit Court's failure to apply the directives of Bruch.

This Petition Presents An Important Issue Of National Concern:The Circuit Split Will Continue Until This Court Rules.

As detailed in the Petition, the question of ERISA severance entitlement in the event of ownership change has produced a sharp and irreconcilable split in the circuits throughout the country. The opposite reasoning and diametrically opposed ERISA entitlement results will not be resolved until the Supreme Court provides guidance on this important and recurring question.

The propriety of review in this case is demonstrated by this Court's recent grant of certiorari to three related Second Circuit cases involving the question of ERISA pre-emption of New York laws relating

to certain hospital rates and surcharges. New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., No. 93-1408; Cuomo v. Travelers Ins., Co., No. 93-1414; Hospital Ass'n of New York State v. Travelers Ins. Co., No. 93-1415. Petitioners urge that review of this recurring ERISA severance benefit question is just as important and appropriate.

Specifically, like the Second Circuit cases, this case involves: (1) an ERISA question that is national in scope and implication; (2) a clear-cut conflict between the circuits; and (3) a conflict with prior ERISA decisions of this Court. Like the Second Circuit cases, review of this decision will provide ERISA guidance to courts throughout the country as they struggle to give ERISA the consistency in application contemplated by Congress and enforced by this Court. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 10, 107 S.Ct. 2211, 96 L.Ed.2d 1, 10 (1987), citing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981); Ingersoll-Rand v. McClendon, 498 U.S. 133, 142, 111 S. Ct. 478, 484, 112 L.Ed.2d 474 (1990).

Until this split is resolved, employers in the Eleventh Circuit will continue to be liable for severance payments in the sale of a business, with

no job loss or interruption. Employers in the Second, Fourth, Sixth, Seventh, Eighth, and Tenth Circuits face no similar liability. Eleventh Circuit employees will have unique ERISA rights to a period of double income. Employees in the Second, Fourth, Sixth, Seventh, Eighth and Tenth Circuits are entitled to no similar windfall.

ERISA severance entitlement cannot properly continue to turn on the geographic location of the participant. The proposition defies the requirement of uniform benefit entitlement standards. Id. The Eleventh Circuit result-oriented entitlement approach defies ERISA's objective of fostering the economic viability and continued existence of voluntary employee benefits. Businesses will be less willing to locate or open facilities in Georgia, Florida, or Alabama, where they will face an unintended severance liability on a sale. And, selling employers in these states now have no incentive to negotiate with a buyer for the continued employment of its staff. In the Eleventh Circuit, severance will be due even where ownership ensured that employees would have the advantage of continued, uninterrupted employment on equivalent terms. In the Eleventh Circuit, employers now have a strong incentive to discontinue severance benefits in their entirety.

Neither Congress nor this Court permits a patchwork of ERISA rights and remedies in the severance pay arena. This Court's review is needed to restore uniformity to ERISA standards governing severance entitlement.

Respectfully submitted,

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ENDNOTE

Bellino v. Schlumberger Tech., Inc., 944 F.2d 26 (1st Cir. 1991); Allen v. Adage, 967 F.2d 695, 701 (1st Cir. 1992); Bradwell v. GAF Corp., 954 F.2d 798 (2d Cir. 1992); Schwartz v. Newsweek, Inc., 827 F.2d 879 (2d Cir. 1987); Accardi v. Control Data Corp., 836 F.2d 126 (2d Cir. 1987); Ulmer v. Harsco Corp., 884 F.2d 98 (3d Cir. 1989); Fuller v. FMC Corp., 4 F.3d 255 (4th Cir. 1993); Sejman v. Warner Lambert Co., Inc., 889 F.2d 1346 (4th Cir. 1989), cert denied; Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985); Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623 (6th Cir. 1987); Sly v. P.R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983); Schroeder v. Phillips Petroleum Co., 17 F.3d 1147 (8th Cir. Mar. 10, 1994); Harper v. R.H. Macy & Co., Inc., 920 F.2d 544 (8th Cir. 1990); Lakey v. Remington Arms Co., Inc., 874 F.2d 541 (8th Cir. 1989); Jung v. FMC Corp., 755 F.2d 708 (9th Cir. 1985); Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984); Headrick v. Rockwell Int'l Corp., 24 F.3d 1272 (10th Cir. 1994) (White, Associate Justice (Ret.)); Anderson v. Ciba-Geigy Corp., 759 F.2d 1518 (11th Cir. 1985); Harris v. Pullman Standard, Inc., 809 F.2d 1495 (11th Cir. 1987); Bedinghaus v. Modern Graphic Arts, 15 F.3d 1027 (11th Cir. 1994) (App. p. 1).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on the 25th day of October, 1994, caused three (3) copies of the foregoing PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION to be served upon the Respondent herein by mailing said copies via first class United States mail, postage prepaid, to the attorney of record at the following address:

Leonard R. Poe, Esquire
P.O. Box 5
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/s/ Joseph M. English
Joseph M. English